Supreme Court, U.S.
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No. 97-1969

In The

Supreme Court of the United States

October Term, 1997

SUSAN WILSON,

Petitioner,

vs.

CITY OF PLANO, TEXAS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is an employer, pursuant to common law principles of agency, liable under Title VII for hostile environment sexual harassment committed by supervisory employees?

2. Whether the Court should remand this case to the Fifth Circuit in light of the Court's decisions in *Faragher v. City of Boca Raton*, No. 97-282, 1998 WL 336322 (June 26, 1998) and *Burlington Industries, Inc. v. Ellerth*, No. 97-569, 1998 WL 336326 (June 26, 1998).

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Statute Cited:

42 U.S.C. § 2000e, *et seq.* 1

Rule Cited:

Supreme Court Rule 15.1 1

Respondent the City of Plano (the "City") requests that this Court deny the Petition for Writ of Certiorari ("Petition") of Susan Wilson seeking review of the judgment of the United States Court of Appeals for the Fifth Circuit.

STATEMENT OF THE CASE

This is an action for alleged employment discrimination under 42 U.S.C. § 2000e, *et seq.* brought by Petitioner Susan Wilson ("Wilson") against the City. For purposes of brevity, and to avoid any inference under Supreme Court Rule 15.1 that the City accepts Petitioner's statement of the case as true, the City directs the Court to the District Court's detailed recitation of the facts as stated in its opinion.[1] Moreover, because Petitioner's statement of the case omits certain crucial facts and distorts others without any citations to the record to support such facts, a brief discussion of certain key points is necessary.

A. Wilson Voluntarily Resigned Her Employment to Pursue Personal Endeavors Without Complaining of Any Alleged Harassment.

Wilson, a building inspections clerk for the City, resigned her employment in December of 1994, by tendering a memorandum which stated as follows:

> It has been a pleasure being part of the City of Plano's growth for the last eight and a half years. I am resigning my position to pursue personal endeavors effective December 30, 1994.

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1. The unpublished opinion of the District Court is attached as an appendix to the Petition for Writ of Certiorari filed by Wilson and will be cited as "App." followed by the page of the appendix to which reference is made. Citations to the Record on Appeal before the Fifth Circuit will be referred to as "R." followed by the volume and page number to which reference is made.

App. at 6a. Wilson reaffirmed the reason for her resignation, when her deposition was taken in the present action:

> Question: And so you did, in fact, resign your position with the City to pursue personal endeavors, true?
>
> Answer: Yes, sir.
>
> Question: And those would have included spending more time with your children, acceding to the wishes of your husband, and trying to improve what you had in the way of marital difficulties, correct?
>
> Answer: And my children.

R. at 392.

B. Wilson Never Complained of Any Alleged Sexual Harassment During her Employment.

As the District Court unequivocally found, Wilson *never* complained of a sexually hostile work environment during her tenure with the City. App. at 6a.

C. Wilson Knew of the City's Grievance Procedure and Failed to Utilize Such Procedure Prior to Her Resignation.

Wilson admits that the City explained its grievance procedure to her during her new employee orientation session. R. at 384, 385-86, 460-461. Wilson admits that she read the City's Employee Handbook which states, in pertinent part, that "[e]mployees . . . who believe they have been subjected to unfair treatment or discrimination, may submit written grievances

through the Human Resources Department." R. at 388, 440-458. Throughout her employment with the City, Wilson knew she could file a grievance with the City's Human Resources Department if she felt she was being treated unfairly. *Id.* Indeed, Wilson admits that she intentionally did not follow the City's grievance procedure until *after* she resigned. R. at 411, 412-414.

Wilson contended in her affidavit filed in opposition to the City's Motion for Summary Judgment that she was unaware of the City's sexual harassment policy prohibiting discrimination. Pet. at 18-19. Nonetheless, Wilson admitted that (i) she knew that sex discrimination was *expressly prohibited* by the City as stated in the Employee Handbook; (ii) she knew that she could file a grievance alleging such discrimination; and (iii) she intentionally did not file a grievance because she believed that the complaint might be placed in her personnel file. R. at 388, 393 455-469.[2]

D. Wilson Conceded that the Remedial Action Taken by the City was Prompt and Appropriate.

The day after Wilson's grievance complaint was received, the City undertook a massive investigation of Wilson's allegations, interviewing over seventy people. App. at 7a. The alleged perpetrator of the harassment resigned in lieu of termination and the department supervisor was suspended without pay for thirty days. App. at 8a. Wilson admits that the City undertook the investigation promptly and agreed that the corrective action taken was appropriate. App. at 8a and R. at 407.

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2. The Employee Handbook expressly states, however, that such grievance complaints will not be placed in an employee's personnel file. R. at 459.

E. The District Court did not Find that Wilson's Claim of Harassment was Meritorious.

Finally, Wilson admits in her Petition that the District Court made no findings as to the merits of her alleged claim of sexual harassment. Pet. at 4 n.1. In footnote 1 of the Petition, Wilson attempts to bolster her claim by citing a litany of "facts" which she alleges constitute sexual harassment. *Id.* The City points out, however, that most of the alleged facts are not contained anywhere in the appellate record. For example, Wilson contends that she testified that her supervisor touched her in an offensive manner. Pet. at 4 n.1. Such testimony is not in the record. Wilson also states that she testified that the head of her department, John Pierce, sexually harassed her, knew of the harassment against her, and failed to act to end the harassment. *Id.* As the District Court aptly pointed out, while Wilson alleges that Pierce knew about and witnessed at least one incident of harassment, "Wilson's citations to the summary judgment evidence does [*sic*] not support that statement."[3] App. at 13a. Moreover, Wilson failed to point out to this Court that she voluntarily participated in much of the office banter of which she now complains, such as commenting that a co-worker had "nice buns." R. at 399.

ARGUMENT

I. REASONS FOR DENYING THE WRIT

Petitioner contends that the writ should be granted to clarify the conflict in the circuits and a misapplication of law by the Fifth Circuit on the issue of how agency principles should be applied in hostile environment sexual harassment cases. Pet. at

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3. For the sake of brevity, the City will not repeat each of the alleged facts which Wilson misstates in footnote 1, but simply urges the Court not to consider any of such statements as there are no citations to the record to support same.

8, 17. Subsequent to the filing of the Petition for Writ of Certiorari in this case, the Court issued its opinions in *Faragher v. City of Boca Raton*, No. 97-282, 1998 WL 336322 (June 26, 1998) and *Burlington Industries, Inc. v. Ellerth*, No. 97-569, 1998 WL 336326 (June 26, 1998). In both cases, the Court held that an employer may be subject to vicarious liability for an actionable hostile environment created by a supervisor. *Faragher* at 19; *Ellerth* at 15. The Court went on to state that an employer may defend against liability or damages, however, if it establishes that (a) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (b) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. *Id.* Since the Supreme Court has clarified the existing standard as to agency liability, there is no longer a conflict in the circuits concerning applicable agency principles and writ should not be granted in this case.

II.

REMAND IS NOT WARRANTED

Remand is not warranted in this instance as the decision below was correct in light of the standard set forth in *Faragher* and *Ellerth*.

First, the City would be entitled to assert the affirmative defense created in *Faragher* as Wilson suffered no tangible employment action. Wilson admitted that she resigned her employment to pursue personal endeavors, such as caring for her children. R. at 392. Wilson also informed the City in her resignation letter that she enjoyed her tenure with the City and was resigning for purely personal reasons. App. at 6a. Based upon the entire record, the District Court found that Wilson resigned her employment to pursue personal endeavors. App. at 6a.

Moreover, self-imposed job detriment, such as a resignation, will not support strict liability. This Court has made it clear that if the *supervisor* makes no tangible employment decision, then the employer will not be strictly liable for his conduct. *Ellerth*, at 11. In this regard, the Court has stated that tangible employment actions are

> means be which the supervisor brings the official power of the enterprise to bear on subordinations. A tangible employment decision requires an official act of the enterprise, a company act.

Id. Thus, as in the instant case, where the change in employment status is not brought about by the decision of the supervisor, but rather is a detriment self-imposed by the employee, liability shall not attach.

Second, the affirmative defense created in *Faragher* would bar recovery in this case. It is undisputed that the City had a policy against discrimination. R. at 421-469, 474-477. Moreover, Wilson admits that, as a new employee, she received the Employee Handbook, which states specifically that the City prohibits sex discrimination and further provides that employees "who believe they have been subjected to unfair treatment or discrimination may submit written grievances through the Human Resources Department." R. at 388, 459. Wilson admits that she was aware of the procedures in the Employee Handbook, but intentionally chose not to file a grievance until *after* she resigned because of her unreasonable fear that the complaint would be placed in her personnel file.[4] R. at 388, 397-398.

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4. It is evident that Wilson's fear was irrational as the Employee Handbook specifically states that such grievances will not be placed in the employee's personnel file and there is no evidence in the record which indicates to the contrary. R. at 459.

Here, the City did everything a reasonable employer could and should do. The City promulgated and implemented a standard policy that sexual harassment and discrimination would not be tolerated. R. at 421-469, 474-477. Wilson was made aware of the policy against discrimination and the grievance procedure for bringing complaints of discrimination at the very beginning of the employment relationship. R. at 384-386, 460-461. The City reinforced this policy by distributing to Wilson, and other employees, its Employee Handbook reiterating its policy against discrimination and explaining that an employee could file a grievance with the City's Human Resources Department if they believed they were being subjected to discrimination. R. at 421-469. Wilson acknowledged that she did not follow the grievance procedure set forth in the City's Employee Handbook until *after* she tendered her resignation. R. at 411, 412-414. Once Wilson followed the procedure of filing a grievance with the City's Human Resources Department, a massive investigation resulted, which culminated in corrective action satisfactory to Wilson. App. at 89 and R. at 407. Indeed, the record is crystal clear that absolutely nothing prevented Wilson from complying with the grievance procedure and attempting to seek a resolution before she voluntarily resigned from the City.

If ever there were a case that qualifies for the affirmative defense set forth in *Faragher*, this is it. The record establishes that the City took reasonable care to avoid and eliminate harassment and Wilson intentionally failed to act with reasonable care to take advantage of the City's grievance procedure to correct such discrimination prior to her resignation. Therefore, the opinion of the District Court and Fifth Circuit are consistent with this Court's recent pronouncements in *Faragher* and *Ellerth* and remand is not warranted.

CONCLUSION

The Petition for Writ of Certiorari should be denied. This case should not be remanded to the Fifth Circuit Court of Appeals for reconsideration.

Respectfully submitted,

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